

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 10, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2016AP364-CR

Cir. Ct. No. 2013CF300

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SCOTT L. HULL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Outagamie County: VINCENT R. BISKUPIC, Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Scott Hull appeals a judgment convicting him of second-degree sexual assault of an intoxicated person. He contends the State violated his due process rights by failing to preserve the victim's recorded interviews with police. Because Hull failed to establish the interviews were

“apparently exculpatory,” or that they were potentially exculpatory and the police acted in bad faith, we affirm the judgment.

BACKGROUND

¶2 The victim, H.M.H., went to Hull’s apartment to discuss Hull’s accusation that H.M.H.’s boyfriend cheated on her and was using drugs. When she first arrived, Hull offered her a beer that she opened herself. During their emotional conversation, Hull comforted her by hugging her. At one point Hull brought her another beer that he had already opened, and they also smoked some marijuana. H.M.H. testified she began to feel “really tired, dizzy,” and “just wanted to lie down right away,” and she “couldn’t even sit up straight any more.” She testified that in the past she had consumed a few beers and marijuana over the same time frame without feeling these symptoms. She laid down on top of a comforter and “passed out right away.”

¶3 When H.M.H. awoke, Hull was standing by the bed “messing with his belt.” She then went to the bathroom, where she noticed her underwear was either inside out or backward. She began to suspect Hull placed a drug in her beer and sexually assaulted her.

¶4 Five days later, at the urging of her boyfriend, H.M.H. reported the assault to police and was interviewed by Officer Ryan Schroeder. During a subsequent one-party consent call with Hull, Hull said he touched H.M.H.’s butt. However, H.M.H.’s underwear was sent to the crime laboratory and tested positive for having Hull’s semen.

¶5 Schroeder testified regarding his interviews with H.M.H. He said she did not initially tell him she and Hull smoked marijuana. Schroeder’s reports

of the interviews were turned over to the defense. However, according to Schroeger, three of the five recorded interviews with H.M.H. were not turned over because they were lost in the Genetec System and were unable to be accessed. Those recordings, along with recordings from other cases, were inadvertently deleted as a result of an “upgrade” to the Genetec Interview Room System software.

¶6 Hull sought dismissal of the complaint, contending the missing recordings would have undermined H.M.H.’s credibility by showing that she initially failed to disclose her use of marijuana with Hull, that she made contradictory statements about receiving and using pills provided to her by Hull seven days before the incident, how long she was in Hull’s apartment, and that she made prior allegations of sexual assault against other people. One of Schroeder’s reports summarized her past with such claims: “However, [H.M.H.] stated that she has reported incidents like this in the past, as she has been sexually assaulted in the past; however, nothing happened. She did not want to have to go through this again if nothing was going to happen.” The circuit court denied Hull’s motion to dismiss, but directed the State to provide additional discovery. The State turned over H.M.H.’s reports of sexual assaults in Oshkosh in 1999 and in Green Lake County in 2001.

DISCUSSION

¶7 Whether destruction of evidence by law enforcement officers constitutes a due process violation involves the application of a constitutional standard, and it is thus a question of constitutional fact that we review de novo. *State v. Greenwold*, 189 Wis. 2d 59, 66-67, 525 N.W.2d 294 (Ct. App. 1994). A defendant’s due process rights are violated by the destruction of material evidence

if the police: (1) failed to preserve the evidence that is apparently exculpatory; or (2) acted in bad faith by failing to preserve evidence that was potentially exculpatory. *State v. Luedtke*, 2015 WI 42, ¶46, 362 Wis. 2d 1, 863 N.W.2d 592.

¶8 Evidence is exculpatory if it is favorable to the accused, either because it tends to establish innocence or because it impeaches the credibility of a prosecution witness. *State v. Harris*, 2004 WI 64, ¶12, 272 Wis. 2d 80, 680 N.W.2d 737. Evidence is “apparently exculpatory” when it possesses an exculpatory value that was apparent before the evidence was lost, and is of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. *State v. Munford*, 2010 WI App 168, ¶21, 330 Wis. 2d 575, 794 N.W.2d 264. There is no bad faith when police negligently, inadvertently or carelessly fail to preserve the evidence. *Id.*

¶9 Hull has not established that the recordings, even if they were apparently exculpatory, contained information that he was unable to obtain by other reasonably available means. Schroeder’s written reports, his and H.M.H.’s trial testimony, and the police reports regarding H.M.H.’s previous allegations of sexual assault fully disclose the facts that have exculpatory value. Hull cross-examined H.M.H. and used the information that could have been discovered from the missing recordings to impeach her testimony. The argument that the missing recordings might contain other exculpatory information is based on pure speculation.

¶10 If the recorded interviews contained only potentially exculpatory evidence, Hull was required to establish bad faith by the police, official animus or a conscious effort to suppress evidence. *See Greenwold*, 189 Wis. 2d at 69. Hull has not met that test for bad faith. Sergeant Chad Riddle testified the police were

not aware of any specific problems with the storage system until they received various discovery requests and they were unable to find multiple interviews from numerous cases. The uncontradicted evidence shows the recordings were lost due to an inadvertent technical glitch during a system upgrade, and Schroeder had no specific knowledge that the recorded interviews would not be preserved.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2015-16).

